

Attorney Docket No.: F3315(C)
Serial No.: 10/664,101
Filed: September 17, 2003
Confirmation No.: 3698

BRIEF FOR APPELLANT

Sir:

This is a Brief on appellant's Appeal from the Examiner's Final Rejections in an Office Action Mailed May 5, 2009 concerning the above-identified application.

The Commissioner is hereby authorized to charge any additional fees, which may be required to our deposit account No. 12-1155, including all required fees under: 37 C.F.R. §1.16; 37 C.F.R. §1.17; 37 C.F.R. §1.18.; 37 C.F.R. §1.136.

Attorney Docket No.: F3315(C)
Serial No.: 10/664,101
Filed: September 17, 2003
Confirmation No.: 3698

BRIEF FOR APPELLANT

TABLE OF CONTENTS

I.	REAL PARTY IN INTEREST	3
II.	RELATED APPEALS AND INTERFERENCES	3
III.	STATUS OF CLAIMS	3
IV.	STATUS OF AMENDMENTS	4
V.	SUMMARY OF CLAIMED SUBJECT MATTER	4
VI.	GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL	6
VII.	APPELLANT'S ARGUMENT	7
VIII.	CLAIMS APPENDIX	24
IX.	EVIDENCE APPENDIX	27
X.	RELATED PROCEEDINGS APPENDIX	28

Attorney Docket No.: F3315(C)
Serial No.: 10/664,101
Filed: September 17, 2003
Confirmation No.: 3698

I. REAL PARTY IN INTEREST

GoodHumor ~ Breyers Ice Cream, Division of Conopco, Inc., a corporation of New York is the real party in interest.

II. RELATED APPEALS AND INTERFERENCES

There are no other prior or pending appeals or interferences or judicial proceedings known to appellant, the appellant's legal representative, or assignee which may be related to, directly affect or be directly affected by or have a bearing on the Board's decision in the pending Appeal.

III. STATUS OF CLAIMS

Claims 1-5, 20, 21 and 23 stand rejected in an Office Action mailed May 5, 2009.

No claims have been allowed.

Claims 6-19 and 22 have been cancelled.

Claims 1-5, 20, 21 and 23 are on Appeal.

Attorney Docket No.: F3315(C)
Serial No.: 10/664,101
Filed: September 17, 2003
Confirmation No.: 3698

IV. STATUS OF AMENDMENTS

No claims were amended subsequent to the latest Office Action.

V. SUMMARY OF CLAIMED SUBJECT MATTER

Independent claim 1 relates to a frozen aerated product having an overrun of between about 10% and about 250% and a pH, when melted, in the range from about 3.5 to about 5.2 (page 4, lines 6-10). The composition is comprised of water; 0 to about 20 w/w% fat; 0.25 to about 20 w/w% milk solids containing proteins and lactose but not fat; 0.05 to about 1.5 w/w% soluble dietary fibre and 0.1 to about 5 w/w% insoluble dietary fibre; and 0.1 to about 35 w/w% sweetener (page 4, lines 9-13). A key feature of the invention is that the composition contains no additional stabilizers and no additional emulsifiers (page 9, line 13 page 1, lines 5-10). The frozen aerated product shows a resistance to meltdown and to serum leakage for extended periods of time as determined by having a meltdown initiation time greater than about 120 minutes when measured at 20° C (page 7, lines 24-31). In addition, the frozen aerated product is made by a process that includes either of the following steps (page 9, line 25 to page 11, line 5):

- a) adjusting the pH of a fruit and/or vegetable puree to a value above an isoelectric point of any protein to be incorporated into the frozen aerated product followed by; producing a premix comprising fat, milk solids not fat, sweetener and about 5 to about 80 w/w% of said pH adjusted fruit and/or vegetable puree followed by; homogenizing and pasteurizing said premix (page 9, line 30 to page 10, line 5); or

Attorney Docket No.: F3315(C)
Serial No.: 10/664,101
Filed: September 17, 2003
Confirmation No.: 3698

b) homogenizing and pasteurizing a premix comprising water, fat, milk solids not fat and sweetener, cooling the pasteurized premix and adding to said premix a fruit and/or vegetable puree containing sufficient soluble and insoluble fibre to provide the necessary soluble and insoluble fibre in the frozen aerated product (page 10, line 30 to page 11, line 5).

Claim 2 specifies that the soluble dietary fibre and the insoluble dietary fibre recited in claim 1 are derived from fruits or vegetables (page 5, lines 26-27).

Claim 3 specifies that the soluble dietary fibre and the insoluble dietary fibre recited in claim 2 are derived from one or more fruit purees, one or more vegetable purees or mixtures thereof (page 5, lines 27-28).

Claim 4 further limits claim 1 by specifying that the frozen aerated product includes about 0.1 to about 1.2 w/w% soluble dietary fibre and about 0.2 to about 2 w/w% of insoluble dietary fibre (page 5, lines 4-10).

Claim 5 further limits claim 1 by specifying that the frozen aerated product includes about 0.2 to about 1 w/w% soluble dietary fibre and about 0.3 to about 1 w/w% of insoluble dietary fibre (page 5, lines 4-10).

Claim 20 specifies that the milk solids recited in claim 1 comprises skim milk powder present at a level of 4 to 6.5 w/w%.

Claim 21 specifies that the frozen aerated product recited in claim 1 has meltdown initiation time greater than 180 minutes (page 7, line 32).

Attorney Docket No.: F3315(C)
Serial No.: 10/664,101
Filed: September 17, 2003
Confirmation No.: 3698

Independent claim 23 is directed to a frozen aerated product having exactly the same physical properties and composition as recited in claim 1. However, the product of claim 23 is made by a process that only includes the steps of adjusting the pH of a fruit and/or vegetable puree to a value above an isoelectric point of any protein to be incorporated into the frozen aerated product followed by; producing a premix comprising fat, milk solids not fat, sweetener and about 5 to about 80 w/w% of said pH adjusted fruit and/or vegetable puree followed by; homogenizing and pasteurizing said premix (page 9, line 17 to page 10, line 5).

VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

Are claims 1-5, 21 and 23 anticipated under 35 USC §102(a) by Koss (WO 02/094035)?

Is claim 20 unpatentable under 35 USC §103(a) over Koss (WO 02/094035) in view of Brake et al (US 6, 432,466 - hereinafter "Brake").

Are claims 1-5, 20 and 21 unpatentable under 35 USC §103(a) over Brake et al (US 6, 432,466 in view of the combination of Jonas (US 4,971,824) and Arbuckle (Ice Cream 2nd Edition, pages 96).

Attorney Docket No.: F3315(C)
Serial No.: 10/664,101
Filed: September 17, 2003
Confirmation No.: 3698

VII. APPELLANT'S ARGUMENTS

Are claims 1-5, 21 and 23 anticipated under 35 USC §102(a) by Koss (WO 02/094035)?

Statement of Facts

Appellants' claims are directed to stable, acidic, frozen aerated products that contain neither an emulsifier nor a stabilizer. The compositions comprise milk solids not fat and sweeteners in combination with specific combination of soluble and insoluble dietary fibers which can be derived by the inclusion of a fruit and/or vegetable puree to provide stability to the composition in the absence of added stabilizers and emulsifiers.

Appellants have further discovered that when milk proteins are incorporated with acid fruit and/or vegetable purees, the properties of the resulting product, especially its resistance to meltdown when exposed to temperatures above the melting point of the frozen product (page 7, lines 24-26) strongly depends both on the content of soluble and insoluble fiber and on the manufacturing process. Appellants have developed two alternative processes recited in claim 1 and claim 23 that provide acceptable products.

In one alternative process (claims 1 and 23) the pH of the fruit and/or vegetable puree is first adjusted to a value which must be above the isoelectric point of any protein that will be incorporated into the product (e.g., pH 4.6 for casein). This *pH adjusted* fruit and/or vegetable puree is then combined with milk solids not fat, sweetener and optionally fat to form a premix which is subsequently homogenized, pasteurized and cooled. The pH of the cooled premix is then adjusted to about 3.5 to about 5.2 and then frozen and aerated to form the product.

Attorney Docket No.: F3315(C)
Serial No.: 10/664,101
Filed: September 17, 2003
Confirmation No.: 3698

In the second alternative process (claim 1) a premix of milk solids non fat, sweetener, water and optional fat are prepared and subsequently homogenized, pasteurized and cooled. To this premix is added a fruit and/or vegetable puree which has already been homogenized and pasteurized and contains the required soluble and insoluble fiber. The premix/puree mixture is then frozen

In contrast, Koss et al relates to methods for preparing nutritional frozen desserts having palatable characteristics and comprising vitamins and minerals. The invention also includes the nutritious frozen desserts, and methods of treating subjects using the frozen desserts (abstract – emphasis added).

Koss teaches that "In general, the method is accomplished by mixing a base component with the nutrients, sweeteners, the acidulant, and optionally emulsifiers, and stabilizers in a mixing tank. Once this mixture is complete, the material is pasteurized, homogenized, chilled and optionally stored with gentle agitation under refrigeration for several hours to a day in a holding tank (s). The entire mixture or a portion of it may then be moved into a flavor vat or tank where optionally a flavor is mixed in." Page 9, lines 11-16

In the above passage, the word "optionally" only qualifies the word "emulsifiers" because of the structure of the sentence, i.e. the word "emulsifiers" and the word "and" is separated by a comma.

Koss teaches suitable nutrients for the frozen deserts of the invention include "for instance, vitamins, minerals, oils, proteins, fibers, phytonutrients, prebiotics, probiotics, botanicals and nutraceuticals". (Page 2, lines 22-23).

Attorney Docket No.: F3315(C)
Serial No.: 10/664,101
Filed: September 17, 2003
Confirmation No.: 3698

Koss teaches that fruit purees can be used as one of many types of optional flavoring ingredient suitable for the nutritional frozen desserts according to invention (page 24, lines 4-17). However, Koss is silent about any criticality regarding the levels of soluble or insoluble dietary fiber present in the composition. Furthermore, none of the examples taught by Koss contain a fruit puree, although two examples contain a lemon-lime concentrate which is a juice concentrate and not a fruit puree.

Koss is silent regarding the meltdown resistance of frozen confections.

Koss et al is silent regarding the isoelectric point of proteins or any processing steps involving pasteurization in which the pH of the fruit puree must be adjusted to a value above the isoelectric point of the protein before it is mixed with the protein and pasteurized.

Appellants' Arguments

MPEP 706.02 states that "...for anticipation under 35 USC 102, the reference must teach every aspect of the claimed invention either explicitly or impliedly. Any feature not directly taught must be inherently present."

Appellants submit that Koss does not teach or suggest either explicitly or implicitly all of the elements recited in appellants' claimed composition. In particular, Koss does not teach a frozen aerated products that among other things *does not contain a stabilizer* (claim 1, 23), *has a meltdown initiation time greater than about 120 minutes when measured at 20° C* (claim 1, 23); *has a meltdown initiation time greater than about 180 minutes when measured at 20° C* (claim 21) and *specifically contains 0.05 to about 1.5*

Attorney Docket No.: F3315(C)
Serial No.: 10/664,101
Filed: September 17, 2003
Confirmation No.: 3698

w/w% soluble dietary fibre and 0.1 to about 5 w/w% insoluble dietary fiber, and is made by a process that include adjusting the pH of a fruit and/or vegetable puree to a value above an isoelectric point of any protein to be incorporated into the frozen aerated product, said pH adjusting followed by; producing a premix comprising fat, milk solids not fat, sweetener and about 5 to about 80 w/w% of said pH adjusted fruit and/or vegetable puree followed by; homogenizing and pasteurizing said premix (claim 23).

Regarding the limitation that the composition *does not contain a stabilizer*, the Examiner held that Koss teaches this limitation because Koss discloses at page 21, lines 1-4 that "the frozen dessert may include other optional ingredients typically present in conventional frozen desserts such as stabilizers".

However, Koss teaches on page 21, lines 17-20 that "The amount of stabilizer included in the frozen dessert is typically in an amount of up to about 1 % in a non fat product and about 0.1-0.5% for other ice cream mixes. In other embodiments, the level of stabilizer may exceed 1% by weight". In point of fact, all of the seven exemplary compositions recited in the Examples disclosed by Koss include a stabilizer.

Thus, Appellants submit that Koss does not teach or imply with any reasonable specificity frozen aerated compositions that are free of added stabilizers.

Regarding *dietary fiber*, the Examiner asserted that Koss teaches compositions that contain 0.5-20% fruit puree and that appellants' state in the specification that the dietary fiber is derived from about 5-80% fruit puree. From these alleged facts, the Examiner concluded that one of ordinary skill in the art at the time the invention was made would expect the composition as taught by Koss to inherently encompasses the instantly claimed amount of fiber.

Attorney Docket No.: F3315(C)
Serial No.: 10/664,101
Filed: September 17, 2003
Confirmation No.: 3698

Koss teaches that fruit purees can be used as one of many types of optional flavoring ingredient suitable for the nutritional frozen desserts according to the invention (page 24, lines 4-17).

Koss further teaches at page 24, line 18 to page 25 line 4 that "the flavoring agents can be fruit or non-fruit flavoring agents and may be natural or synthetic. Examples of suitable natural flavorings include: (1) citrus and noncitrus fruit flavors (e.g., whole or comminuted fresh fruit, fruit purees, fruit concentrates, extracts or essences, candied or glazed fruits, and dried fruits); (2) sugar free versions of such fruit flavorings; (3) flavors derived from botanicals; (4) spices; (5) chocolate, cocoa or chocolate liquor; (6) coffee; (7) natural flavorings obtained from vanilla beans; (8) nuts, including nutmeats and nut extracts from pecans, walnuts, almonds, pistachios, filberts and peanuts. Other sources of natural flavorings include liqueur flavorings such as alcohol, whiskey and other distilled beverages, fruit brandy distillate and brandy flavor essence, and fruit liqueurs. Examples of non-natural or synthetically derived flavorings include aromatic chemicals and imitation flavors. The particular amount of flavoring substance included in the frozen dessert products of the present invention will depend upon the flavor effects desired and the particular flavoring substance used. Usually, the flavoring substance comprises from about 0.5% to about 20% of the product. In one embodiment a non-fruit flavoring ranges from about 0.5% to about 4% where the preferred embodiment being about 1 % to about 1.5% by weight of the formula. In another embodiment, a fruit flavoring may range from about 5% to about 20% and more preferably from about 11% to about 16% by weight" (emphasis added).

Attorney Docket No.: F3315(C)
Serial No.: 10/664,101
Filed: September 17, 2003
Confirmation No.: 3698

However, Koss is silent about any criticality regarding the levels of soluble or insoluble dietary fiber present in the composition. Furthermore, none of the examples taught by Koss contain a fruit puree.

In contrast appellants' specify on page 5, line 30-33 that "the requisite amounts of soluble dietary fibre and of insoluble dietary fibre may be provided by incorporating into the mix from which the frozen aerated product is prepared the appropriate amount of a fruit puree". [Emphasis added] Appellants' further state that on page 6, lines 13-15 that the amount of fruit puree to be incorporated into the frozen aerated products of the present invention may be in the range of about 5 to about 80% w/w.

Thus, Koss teaches fruit purees as an optional flavoring agent whose amount is selected depending upon the flavor effects desired and the particular flavoring substance used while appellants require particular levels of soluble and insoluble fibers for physical stability which may be derived by using fruit/and or vegetable purees in amounts selected to deliver these level of fibers.

Put another way, Koss does not disclose that the levels of soluble and insoluble fiber are "results effective variables" for meltdown resistance and stability nor does Koss provide any tests or criteria for product stability.

Regarding compositions having a *meltdown initiation time greater than about 120 minutes when measured at 20° C*, although Koss is silent about meltdown resistance, the Examiner asserted that since Koss teaches "substantially the same composition" as Appellants' products, the Koss composition would inherently have the same meltdown initiation time. Appellants respectfully submit that Koss does not teach substantially the same composition as recited in claim 1.

Attorney Docket No.: F3315(C)
Serial No.: 10/664,101
Filed: September 17, 2003
Confirmation No.: 3698

Appellants' composition does not contain a stabilizer, is stabilized by specific levels of soluble and insoluble fibers and is prepared by a certain process. All the compositions specifically disclosed by Koss in preferred embodiments and examples contain stabilizer and no examples contain fruit/and or vegetable purees, let alone purees in the absence of stabilizer that specifically provide the levels of soluble and insoluble fibers recited in appellants' claims.

Regarding the product by process element recited in step(a) of claim 1 and in claim 23, Koss is silent regarding the isoelectric point of any protein and *pH adjusted purees*. Furthermore, Koss specifically teaches that "In general, the method is accomplished by mixing a base component with the nutrients, sweeteners, the acidulant, and optionally emulsifiers, and stabilizers in a mixing tank. Once this mixture is complete, the material is pasteurized, homogenized, chilled and optionally stored with gentle agitation under refrigeration for several hours to a day in a holding tank (s). The entire mixture or a portion of it may then be moved into a flavor vat or tank where optionally a flavor is mixed in." Page 9, lines 11-16 (Emphasis added). Thus, Koss specifically teaches that if purees are optionally added, they are added after the homogenization/pasteurization step.

Claims 4-5 and 21 are even further removed from Koss because they recite still narrower ranges for the amounts soluble and insoluble fibers and meltdown initiation time.

Absent a disclosure of the specific combination of elements discussed above, Koss could not anticipate Appellants' claims under 35 USC §102(a).

Attorney Docket No.: F3315(C)
Serial No.: 10/664,101
Filed: September 17, 2003
Confirmation No.: 3698

Is claim 20 unpatentable under 35 USC §103 (a) over Koss (WO 02/094035) in view of Brake et al (US 6, 432,466 - hereinafter "Brake").

Statement of Facts

Appellants' invention has already been discussed.

In addition to the aspects discussed above, Koss teaches dairy based components such as non-fat dry milk can included as optional components. The only example disclosed contains 1.8% non-fat dry milk (Example I, page 27).

Brake et al was relied upon by the Examiner for teaching that milk solids non-fat can be included in confections as an optional ingredient from 0 to 10% in order to provide textural properties (page 4 of Office action mailed October 30, 2008).

Brake specifically teaches that "the stabilizer ingredient is used to improve the ability of the products to withstand commercial shelf life and substantial heat shock without undue deterioration" (column 3, lines 37-41) and discloses that the stabilizer must be present at a level of about 0.2% to 1.5% by weight of frozen dessert product (Claim 1).

Brake is silent with respect to compositions that contain no additional stabilizer, aerated products that have any specific overrun, pH, meltdown resistance, meltdown initiation time and any specific amounts of fiber and teaches that milk solids are optional ingredients.

Attorney Docket No.: F3315(C)
Serial No.: 10/664,101
Filed: September 17, 2003
Confirmation No.: 3698

Brake is also silent regarding the isoelectric point of proteins or any processing steps involving pasteurization in which the pH of the fruit puree must be adjusted to a value above the isoelectric point of the protein before it is mixed with the protein and pasteurized.

Appellants' Arguments

To qualify as a 103(a) reference "The prior art reference, or combination of references, must teach or suggest all of the claim limitations (MPEP §2143). In addition to providing at least a suggestion of all the claim limitations, both the suggestion and the reasonable expectation of success must be found in the prior art references, not in Appellant's disclosure" (See *In re Vaeck*, 20 U.S.PQ.2d 1438, 947 F.2d 448 (Fed Cir. 1991)

Appellants first point out that a previous 103(a) rejection of a claim which was in fact broader than amended claim 20 over a combination of Brake and Koss was withdrawn in an Office Action mailed January 9, 2008.

Appellants submit that the combination of Koss and Brake does teach or suggests all the elements recited in claim 20.

As discussed in detail above in appellants' arguments concerning the 102(a) rejection, Koss does not teach a composition that specifically *does not contain a stabilizer* (claim 1, 23), *specifically contains 0.05 to about 1.5 w/w% soluble dietary fibre and 0.1 to about 5 w/w% insoluble dietary fiber*, *has a meltdown initiation time greater than about 120 minutes when measured at 20° C* (claim 1, 23); *has a meltdown initiation time greater than about 180 minutes when measured at 20° C* (claim 21) and is made by a process that include *adjusting the pH of a fruit and/or vegetable puree to a value above*

Attorney Docket No.: F3315(C)
Serial No.: 10/664,101
Filed: September 17, 2003
Confirmation No.: 3698

an isoelectric point of any protein to be incorporated into the frozen aerated product, said pH adjusting followed by; producing a premix comprising fat, milk solids not fat, sweetener and about 5 to about 80 w/w% of said pH adjusted fruit and/or vegetable puree followed by; homogenizing and pasteurizing said premix (claim 1 and 23).

Brake does not remedy the shortcomings of Koss as a 103(b) references. In point of fact, Brake specifically teaches that "the stabilizer ingredient is used to improve the ability of the products to withstand commercial shelf life and substantial heat shock without undue deterioration" (column 3, lines 37-41) and discloses that the stabilizer must be present at a level of about 0.2% to 1.5% by weight of frozen dessert product (claim 1 of Brake). Thus, Brake teaches away from any composition that contain no additional stabilizer having any overrun, pH, meltdown initiation time and any specific amounts of fiber and milk solids.

Koss and Brake deal with very different technical problems than appellants' invention: Koss to the delivery of nutrients in a palatable form and Brake to the delivery of high fruit content frozen desserts with creamy smooth texture. In contrast appellants' invention deals with stabilizing frozen aerated products with a combination of soluble and insoluble fibers in the absence of added stabilizers.

Absent disclosure of the elements discussed above the combination of Koss and Brake et al does not present a *prima facie* case of obviousness over claim 20.

It is well held that on the issue of obviousness, the combined teaching of the prior art as a whole must be considered. Specifically "It is impermissible within the framework of 103 to pick and choose from any one reference only so much of it as will support a given position, to the exclusion of other parts necessary to the full appreciation of what

Attorney Docket No.: F3315(C)
Serial No.: 10/664,101
Filed: September 17, 2003
Confirmation No.: 3698

such references fairly suggest to one of ordinary skill in the art" (EWP Corp v. Reliance Universal, Inc 755 F.2d at 907 – see also Bausch & Lomb, Inc v. Barnes-Hind/Hydrcurve, Inc 796 F.2d 44, 448-49 (Fed Cir. 1986).

Appellants' respectfully submit that the Examiner has picked and chosen elements from Brake to combine with Koss that supports an obviousness argument while ignoring key parts of all the references which are intrinsically incompatible and would have dissuaded a person of ordinary skill in the art from making the modification which the Examiner has stated a being obvious.

To derive appellants' claimed invention as suggested by the Examiner, a person of ordinary skill in the art would have had to select purees from the optional flavor ingredients taught by Koss, exclude stabilizers which Koss teaches in all the examples and which Brake teaches are essential components; select the level of fruit puree to achieve a meltdown resistance indicative of high stability even though this parameter is not recognized as a "results effective variable" of stability by either Koss or Brake; and to further have included non-fat dry milk from among the optional ingredients recited by Koss and Brake at a level of 4-6.5%.

Appellants submit that a patent composed of several elements is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art. "There must be some articulated reasoning with *some rational underpinning* to support the legal conclusion of obviousness." *Id.* (quoting *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006) (emphasis added)).

Appellants respectfully submit that in constructing the arguments, the Examiner has used the knowledge gained from appellants' disclosure as a blueprint in an attempt to

Attorney Docket No.: F3315(C)
Serial No.: 10/664,101
Filed: September 17, 2003
Confirmation No.: 3698

reconstruct their claimed invention from isolated pieces of prior art. This approach contravenes the statutory mandate of §103 which requires judging obviousness at the point in time when the invention was made. *Grain Processing v. American Maize-Pros. Co.*, 840 F.2d 902, 907 (Fed. Cir. 1988).

Are claims 1-5, 20 and 21 unpatentable under 35 USC §103 (a) over Brake et al (US 6, 432,466 in view of the combination of Jonas (US 4,971,824) and Arbuckle (Ice Cream 2nd Edition, pages 96).

Statement of Facts

Brake specifically teaches that a stabilizer must be present at a level of about 0.2% to 1.5% by weight of frozen dessert product (Claim 1). According to Brake, the "stabilizer ingredient is used to improve the ability of the products to withstand commercial shelf life and substantial heat shock without undue deterioration" (column 3, lines 37-41).

Brake is silent with respect to any composition which is stabilized by a specific combination of soluble and insoluble fibers without any additional stabilizer that have any specific overrun, pH, meltdown resistance, meltdown initiation time.

Brake is also silent regarding the isoelectric point of proteins or any processing steps involving pasteurization in which the pH of the fruit puree must be adjusted to a value above the isoelectric point of the protein before it is mixed with the protein and pasteurized.

Attorney Docket No.: F3315(C)
Serial No.: 10/664,101
Filed: September 17, 2003
Confirmation No.: 3698

Jonas was relied upon by the Examiner for teaching frozen dessert comprising fruit puree; pH adjusted within the appropriate range (when pH is too high results in unset food which remains liquid after processing while when pH is too high results in a product which can separate); pH less than about 4.5; an overrun of 18-100 which is adjusted depending on the desired form and hardness of the final product

Jonas does not disclose compositions containing milk solids in combination with fruit purees or other sources of dietary fiber. Jonas in fact dissuades the use of milk solids, stating at column 3, lines 33-41 "The fruit products described herein provide a creamy type frozen dessert without the disadvantageous ingredients of a milk product based food. For example, the dessert of the instant invention has no milk, milk solids, lactose, cholesterol, added sugars or artificial flavors". (emphasis added).

Jonas like Brake is silent regarding the meltdown resistance of frozen confection.

Jonas like Brake is silent regarding the isoelectric point of proteins or any processing steps involving pasteurization in which the pH must be adjusted to a value above the isoelectric point of the protein.

Arbuckle was relied upon by the Examiner for teaching "that stabilizers and emulsifiers are generally included in frozen desserts, however, many excellent frozen confections are made without additional stabilizers and emulsifiers, such as when milk and milk products are included in the confection" (Office Action mailed October 30, 2008, page 5).

Arbuckle is silent regarding stabilized frozen aerated products combining soluble and insoluble fibers and milk solids not fat.

Attorney Docket No.: F3315(C)
Serial No.: 10/664,101
Filed: September 17, 2003
Confirmation No.: 3698

Arbuckle is silent about meltdown resistance in general and meltdown resistance of combination of frozen confections comprising milk solids in combination with fruit and/or vegetable purees.

Arbuckle, like Brake and Jonas is silent regarding the isoelectric point of proteins or any processing steps involving pasteurization in which the pH must be adjusted to a value above the isoelectric point of the protein.

Appellants Arguments

It is well held that on the issue of obviousness, the combined teaching of the prior art as a whole must be considered. Specifically, "It is impermissible within the framework of 103 to pick and choose from any one reference only so much of it as will support a given position, to the exclusion of other parts necessary to the full appreciation of what such references fairly suggest to one of ordinary skill in the art" (EWP Corp v. Reliance Universal, Inc 755 F.2d at 907 – see also Bausch & Lomb, Inc v. Barnes-Hind/Hydrcurve, Inc 796 F.2d 44, 448-49 (Fed Cir. 1986).

Appellants' respectfully submit that the Examiner has picked and chosen elements from Brake, Jonas, and Arbuckle that supports an obviousness argument while ignoring key parts of all the references which are intrinsically incompatible and would have at dissuaded a person of ordinary skill in the art from having made the modification which the Examiner has stated a being obvious.

Attorney Docket No.: F3315(C)
Serial No.: 10/664,101
Filed: September 17, 2003
Confirmation No.: 3698

To derive appellants' claimed invention as suggested by the Examiner, a person of ordinary skill in the art would have had to make the following modifications of the prior art:

- i) Leave out the additional stabilizers taught by Brake to be an integral part of the invention and a claimed element (claim 1) while ignoring the Brake teaching that the "stabilizer ingredient is used to improve the ability of the products to withstand commercial shelf life and substantial heat shock without undue deterioration" (column 3, lines 37-41)
- ii) Incorporate into Brake the teaching of Jonas regarding pH and over-run while ignoring a central teaching of Jonas that "the fruit products described herein provide a creamy type frozen dessert without the disadvantageous ingredients of a milk product based food. For example, the dessert of the instant invention has no milk, milk solids, lactose, cholesterol, added sugars or artificial flavors". (column 3, lines 33-41 emphasis added).
- iii) Utilize the vague teaching of Arbuckle in a monograph on Ice Cream that "many excellent frozen confections are made without additional stabilizers and emulsifiers, such as when milk and milk products are included in the confection" while ignoring the teaching of Brake that frozen confections including those which contain milk solids albeit as an optional ingredient must have a stabilizer and the Jonas teaching that milk solids are a "disadvantageous ingredient" in the composition.
- iv) Recognize that both the level of soluble and insoluble fiber and the detailed manufacturing process are "results effective variables" for meltdown resistance even though neither is mentioned as such by Brake, Jonas or Arbuckle.

Attorney Docket No.: F3315(C)
Serial No.: 10/664,101
Filed: September 17, 2003
Confirmation No.: 3698

Appellants submit that a patent composed of several elements is not provided obvious merely by demonstrating that each of its elements was, independently, known in the prior art. "There must be some articulated reasoning with *some rational underpinning* to support the legal conclusion of obviousness." *Id.* (quoting *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006) (emphasis added)).

Appellants are at a loss for any reason, let alone one with rational underpinning which would have motivated a person of ordinary skill in the art to have made any of the modifications discussed above.

Appellants respectfully submit that in constructing the arguments, the Examiner has used the knowledge gained from appellants' disclosure as a blueprint in an attempt to reconstruct their claimed invention from isolated pieces of prior art. This approach contravenes the statutory mandate of §103 which requires judging obviousness at the point in time when the invention was made. *Grain Processing v. American Maize-Prod. Co.*, 840 F.2d 902, 907 (Fed. Cir. 1988).

Furthermore, even in the unlikely event the references were combined they would not teach or suggest all of the limitations recited in appellants' claims as required for obviousness under §103(b).

Appellants submit that the combination of Brake, Jonas and Arbuckle does not teach or suggests among other things a composition that contains *the recited levels of soluble and insoluble fibers, does not contain additional stabilizer, has a meltdown initiation time greater than about 120 minutes when measured at 20° C which is further ensured by the specific processing steps recited in claims 1 and 23.*

Attorney Docket No.: F3315(C)
Serial No.: 10/664,101
Filed: September 17, 2003
Confirmation No.: 3698

Brake and Jonas deal with very different technical problems than appellants invention and Arbuckle is a review monograph on *Ice Cream*. Absent disclosure of the elements discussed above, the combination of Brake, Jonas and Arbuckle does not present a *prima facie* case of obviousness over 1-5, 20 and 21 and is even further removed from claim 23.

In view of the forgoing arguments, appellants submit that the claims at issue are both novel and non-obvious to the standards required by 102(a) and 103(a) over the prior art of record. Appellants respectfully request the Board of Appeals and Interferences to reverse the rejection and have the Examiner issue the claims.

Respectfully submitted,

/ Michael P. Aronson /

Michael P. Aronson
Registration No. 50,372
Agent for Appellants

MPA/sm
201-894-2412 or 845-708-0188

Attorney Docket No.: F3315(C)
Serial No.: 10/664,101
Filed: September 17, 2003
Confirmation No.: 3698

VIII. CLAIMS APPENDIX

Claim 1. A frozen aerated product having an overrun of between about 10% and about 250% and a pH, when melted, in the range from about 3.5 to about 5.2, comprising:

- i) water;
- ii) 0 to about 20 w/w% fat
- iii) 0.25 to about 20 w/w% milk solids containing proteins and lactose but not fat;
- iv) 0.05 to about 1.5 w/w% soluble dietary fibre and 0.1 to about 5 w/w% insoluble dietary fibre;
- v) 0.1 to about 35 w/w% sweetener;

wherein the composition contains no additional stabilizers and no additional emulsifiers;

wherein the frozen aerated product shows a resistance to meltdown and to serum leakage for extended periods of time as determined by having a meltdown initiation time greater than about 120 minutes when measured at 20° C; and

wherein the frozen aerated product is made by a process that includes either of the following steps:

- a) adjusting the pH of a fruit and/or vegetable puree to a value above an isoelectric point of any protein to be incorporated into the frozen aerated product followed by; producing a premix comprising fat, milk solids not fat, sweetener and about 5 to about 80 w/w% of said pH adjusted fruit and/or vegetable puree followed by; homogenizing and pasteurizing said premix; or
- b) homogenizing and pasteurizing a premix comprising water, fat, milk solids not fat and sweetener, cooling the pasteurized premix and adding to said premix a fruit

Attorney Docket No.: F3315(C)
Serial No.: 10/664,101
Filed: September 17, 2003
Confirmation No.: 3698

and/or vegetable puree containing sufficient soluble and insoluble fibre to provide the necessary soluble and insoluble fibre in the frozen aerated product.

Claim 2 A frozen aerated product according to claim 1 wherein the soluble dietary fibre and the insoluble dietary fibre are derived from fruits or vegetables.

Claim 3. A frozen aerated product according to claim 2 wherein the soluble dietary fibre and the insoluble dietary fibre are derived from one or more fruit purees, one or more vegetable purees or mixtures thereof.

Claim 4. A frozen aerated product according to claim 1 comprising about 0.1 to about 1.2 w/w% soluble dietary fibre and about 0.2 to about 2 w/w% of insoluble dietary fibre.

Claim 5. A frozen aerated product according to claim 1 comprising about 0.2 to about 1 w/w% soluble dietary fibre and about 0.3 to about 1 w/w% of insoluble dietary fibre.

Claim 20. A frozen aerated product according to claim 1 wherein the milk solids comprise skim milk powder present at a level of 4 to 6.5 w/w%.

Claim 21. A frozen aerated product according to claim 1 wherein the meltdown initiation time is greater than 180 minutes.

Claim 23. A frozen aerated product having an overrun of between about 10% and about 250% and a pH, when melted, in the range from about 3.5 to about 5.2, comprising:

- i) water;
- ii) 0 to about 20 w/w% fat
- iii) 0.25 to about 20 w/w% milk solids containing proteins and lactose but not fat;

Attorney Docket No.: F3315(C)
Serial No.: 10/664,101
Filed: September 17, 2003
Confirmation No.: 3698

- iv) 0.05 to about 1.5 w/w% soluble dietary fibre and 0.1 to about 5 w/w% insoluble dietary fibre;
- v) 0.1 to about 35 w/w% sweetener;

wherein the composition contains no additional stabilizers and no additional emulsifiers;

wherein the frozen aerated product shows a resistance to meltdown and to serum leakage for extended periods of time as determined by having a meltdown initiation time greater than about 120 minutes when measured at 20° C; and

wherein the frozen aerated product is made by a process that includes the steps of adjusting the pH of a fruit and/or vegetable puree to a value above an isoelectric point of any protein to be incorporated into the frozen aerated product followed by; producing a premix comprising fat, milk solids not fat, sweetener and about 5 to about 80 w/w% of said pH adjusted fruit and/or vegetable puree followed by; homogenizing and pasteurizing said premix.

Attorney Docket No.: F3315(C)
Serial No.: 10/664,101
Filed: September 17, 2003
Confirmation No.: 3698

IX. EVIDENCE APPENDIX

None

Attorney Docket No.: F3315(C)
Serial No.: 10/664,101
Filed: September 17, 2003
Confirmation No.: 3698

X. RELATED PROCEEDINGS APPENDIX

None.